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No. 07-1152

IN THE
Supreme Court of the United States

CHARLES ODELL WELDON AND
ERIC A. WILES, INDIVIDUALLY AND IN HIS CAPACITY AS EXECUTOR OF THE ESTATE OF LARRY ARNOLD WILES,
Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

REPLY BRIEF FOR PETITIONERS

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CONSTITUTION, STATUTES, AND RULES

U.S. Const. art. VI, § 2 (Supremacy Clause) 1, 2, 3, 8, 11

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This case involves a direct encroachment by a state legislature on Congress's statutory policy judgments, as long upheld by this Court. It implicates a specific conflict between Ohio and Georgia on whether states' asbestos reform efforts work substantive changes to the rights of plaintiffs and also broader judicial conflicts over the standards to apply in judging FELA preemption of state-law requirements. The decision below divests rail workers in one of the nation's largest states from federal remedies long recognized by this Court. Certiorari therefore is warranted.

I. ALL ISSUES RAISED IN THE PETITION ARE PROPERLY BEFORE THIS COURT

Respondent's opening argument erroneously maintains (at 7-13) that petitioners failed to raise the specific argument that H.B. 292 is preempted because it is inconsistent with FELA causation standards.

Respondent initiated this action, seeking a declaration that application of H.B. 292 to FELA claims is consistent with the Supremacy Clause. *See* Opp. 6. Petitioners have consistently argued that Ohio cannot burden the exercise of rights under the FELA through threshold evidentiary requirements and cited this Court's decision in *Rogers v. Missouri Pacific Railroad*, 352 U.S. 500 (1957), before the appellate court, as respondent admits (at 8-9). Petitioners argued that H.B. 292's causation standard is inconsistent with *Rogers*, which adopted a relaxed FELA causation standard. Appellant's Br. 8; *see id.* at 12 (quoting decision that construed *Rogers* as articulating standard that a carrier is liable when "'negligence . . . played any part, however small, in the injury or death'"). In opposing petitioners' motion to reconsider the Ohio Supreme Court's decision, moreover, respondent argued that reconsideration

was not necessary despite the Ohio Supreme Court's refusal to accept petitioners' merits brief because petitioners "briefed their position at length before the Eighth District Court of Appeals" and therefore "their position on the issues involved in this appeal are contained in the record." Opp. to Mot. for Recon. 2 (Oct. 25, 2007). Based on that representation and the fact that petitioners preserved this causation argument before the state court of appeals, respondent cannot now be heard to argue that petitioners did not sufficiently raise an argument based on *Rogers*.[1]

In any event, the Ohio court unquestionably passed on whether H.B. 292's threshold evidentiary rules may be constitutionally applied to FELA claims: "[t]he central issue presented for our consideration concerns whether the application of the prima facie filing requirements of [H.B. 292], as codified in R.C. 2307.92, to asbestos claims arising out of the [FELA] . . . infringes upon the Supremacy Clause." Pet. App. 1a. Section 2307.92 includes the substantial-contributing-factor causation standard. *See id.* at 51a. Indeed, the court below quoted the provision of H.B. 292 that requires a plaintiff to submit evidence establishing that "exposure to asbestos is a substantial contributing factor to the medical condition." *Id.* at 3a. Accordingly, respondent's position that the court below did not resolve whether H.B. 292's causation standard may be constitutionally applied to FELA claims has no merit.

Because the court below "passed upon" the broad issue of the constitutionality of H.B. 292's application

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[1] Petitioners further cited *Rogers* and the Georgia Supreme Court's decision (discussed below) regarding the substantial-contributing-factor standard in their motion for reconsideration. *See* Mot. for Recon. (Oct. 18, 2007).

to FELA claims as well as the subsidiary issue of whether the substantial-contributing-factor standard may be applied to FELA claims, it is well settled that this Court "permits review of [the] issue." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks and alteration omitted); *see United States v. Williams*, 504 U.S. 36, 40-45 (1992).[2] To be sure, the Ohio Supreme Court did not discuss *Rogers*, but that only underscores the substantial error in the court's analysis: the court undertook no meaningful consideration of the burdens that H.B. 292's threshold evidentiary rules — including the heightened causation standard — impose on FELA claimants. *See* Pet. 12-21.

Respondent's reliance (at 8) on Supreme Court Rule 14(g)(i) is no more availing. That rule facilitates the identification of a federal question in a state proceeding, and the constitutionality of H.B. 292's application to FELA claims unquestionably raises a federal question. The petition, moreover, sets forth how that question was raised below: respondent sought a declaration on preemption, *see* Pet. 9-11, and the Ohio court decided that federal question, as even respondent's statement of the question presented acknowledges.[3]

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[2] Even had petitioners not cited *Rogers*, petitioners' argument now is a "new argument to support what has been [a] consistent claim" that the Supremacy Clause bars application of H.B. 292 to FELA claims. *Lebron*, 513 U.S. at 379.

[3] The absence of a merits brief before the court below has no bearing on the propriety of this Court's review. The issue of whether a state statute purporting to govern federal claims is preempted implicates substantial public interests. To immunize the decision from review based on a private default would be inconsistent with this Court's duty to ensure the correct and uniform interpretation of the FELA. Nor does the absence of a

II. H.B. 292 CANNOT CONSTITUTIONALLY BE APPLIED TO FELA CLAIMS

A. The petition establishes that the decision below cannot be reconciled with this Court's FELA precedent (as well as the FELA precedent of state high courts). *First*, the Ohio Supreme Court erred in classifying H.B. 292's evidentiary rules as procedural. H.B. 292's rules "condition[] the right of recovery that Congress has authorized [under the FELA], and do[] so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize . . . liability," *Felder v. Casey*, 487 U.S. 131, 141 (1988), and the rules impose a passel of threshold standards, burdens of proof, and evidentiary rules that are substantive, not procedural, in nature, *see* Pet. 12-17. *Second*, even if H.B. 292's rules could be deemed procedural, the Ohio court's decision conflicts with decisions of this Court — including *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949) — holding that state rules of procedure may not undermine substantive rights afforded by and interests protected by the FELA. *See* Pet. 18-21. The petition shows that application of H.B. 292 to FELA claims substantially undermines the remedial purposes of the FELA and Congress's interest in uniform application of the statute.

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merits brief by petitioners affect this case's status as a vehicle for review in light of respondent's concession below that the Ohio court "gave due consideration to the arguments presented by Norfolk and the position taken by [petitioners] which was adopted by the Eighth Appellate District. [The court] understood the issues raised in the case, appreciated the impact its decision would have on FELA asbestos claimants in Ohio and rendered a well-reasoned opinion supported by precedent from [this Court.]" Opp. to Mot. for Recon. 10.

B. Respondent's defense of the decision below is unconvincing. *First*, respondent incorrectly contends (at 1) that H.B. 292 does not conflict with federal law because the court "construed the statute to require no more than a preliminary evidentiary showing that the plaintiff has a good-faith basis for the claims asserted." H.B. 292 actually imposes a series of detailed evidentiary requirements. *See* Pet. 6-8. The court below held that application of each of those requirements to FELA claims is constitutional. The "good-faith basis" language quoted by respondent is the court's characterization of H.B. 292's requirements, not an interpretation of the substance of what H.B. 292 requires.

Accordingly, there is no cause to defer reviewing H.B. 292's application to FELA claims until there is further judicial exegesis of H.B. 292. *See* Opp. 10. Respondent points to no ambiguity in H.B. 292's threshold evidentiary rules, and there is none. H.B. 292, for example, defines "substantial contributing factor" with specificity. *See* Ohio Rev. Code Ann. § 2307.91(FF). As defined, that standard exceeds any formulation of the FELA's causation standard, as exposure to asbestos must be a "predominate cause" of injury and supported by a "reasonable degree of medical certainty." *Id.*; *see* Pet. 15 n.6; *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994) (FELA's "relaxed standard of causation" reflects "Congress' remedial goal"). Respondent's position that FELA claimants in Ohio should wait until a court announces that the text of H.B. 292 means what it says is an illogical prerequisite to this Court's plenary review. *See* Opp. 9 (criticizing petitioners for "[a]rguing only from the text of the state statute").

Second, respondent argues (at 10) that H.B. 292 governs medical, not legal, causation and is thus not preempted. Not so. A plaintiff carries a burden of showing the defendant caused the injury suffered. In the asbestos context, that means showing that the disease suffered is caused by asbestos exposure that, in turn, is caused by the defendant. "Medical causation" is thus part and parcel of "legal causation." The upshot of H.B. 292 is to take one key link in the overall chain of causation and subject that link to a stricter causation standard than would govern under federal law. That outcome cannot be squared with either the broad remedial purposes of the FELA or Congress's desire for uniformity.

Third, respondent relies (at 3-4) on H.B. 292's aim of managing asbestos litigation. That reliance is misplaced. As this Court said in *Norfolk & Western Railway v. Ayers*, 538 U.S. 135 (2003), "[c]ourts . . . must resist pleas . . . to reconfigure established liability rules because they do not serve to abate today's asbestos litigation crisis." *Id.* at 166. In our federal system, state legislatures may not frustrate the ends of federal law to achieve asbestos reform. The decision to afford broad recovery to FELA claimants "was a choice that Congress . . . made, and it is a decision that the State has no authority to override"; regardless of how "understandable or laudable the State's interest in controlling liability expenses might otherwise be, it is patently incompatible with the compensatory goals of the federal legislation." *Felder*, 487 U.S. at 143.[4]

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[4] Respondent's attempt (at 16-17) to recast the purposes of H.B. 292 is similarly unavailing. H.B. 292 implements the Ohio legislature's views regarding the inefficiency of state and federal asbestos litigation, and the legislature's aim of reducing

Fourth, respondent argues (at 19) that H.B. 292 can be squared with numerous FELA decisions of this Court simply because the Ohio court described H.B. 292 as a "procedural prioritization" and "[n]othing more." This argument is wide of the mark because a state's label is irrelevant to preemption analysis. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 333-35 (1988); Pet. 12 n.4. Petitioners have established that H.B. 292's threshold evidentiary rules substantively regulate FELA claims in a manner inconsistent with multiple decisions of this Court. *See supra* p. 4.[5]

Similarly, and contrary to respondent's claim (at 19-20), it is irrelevant that H.B. 292 does not affect the liability phase of trial. As this Court held in *Felder*, "although a party bringing suit against a local governmental unit need not allege compliance with the notice statute" — and thus the statute did not affect the elements of a cause of action — "the statute confers on . . . defendants an affirmative defense that obligates the plaintiff to demonstrate compliance with the notice requirement before he or she may recover at all." 487 U.S. at 144. H.B. 292 here gives defendants a right to seek the dismissal of

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aggregate liability. *See* Pet. 6. Congress has made a different choice with respect to railroad workers. *See, e.g., Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) ("it is clear that the general congressional intent . . . was to provide liberal recovery for injured workers"). "State courts," this Court has emphasized, "are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right." *Felder*, 487 U.S. at 152.

[5] H.B. 292 is not, as respondent suggests, a prioritizing scheme: FELA claimants that cannot satisfy H.B. 292 can never have their claims adjudicated in state court, whereas prior to H.B. 292 they could.

FELA claims based on a plaintiff's inability to satisfy threshold evidentiary requirements. It should be evident from FELA precedent that Ohio may not, consistent with the Supremacy Clause, alter the elements of a FELA cause of action at trial; and it follows that Ohio is not free to accomplish indirectly, by imposing evidentiary rules as a condition precedent to pursuing FELA claims, what it cannot do directly.[6]

Fifth, the MDL case management order does not save H.B. 292 from preemption, as respondent argues (at 23-26). Unlike H.B. 292, the case management order does not: define the quantum of evidence required for reinstatement; impose causation and evidentiary requirements stricter than those imposed under substantive law; define with specificity the qualifications of the medical professional that must provide a diagnosis; impose burdens of proof inconsistent with substantive law; or purport to regulate at all the contents of the affidavit. *See* Pet. 24-25. Respondent's only response (at 26) to these crucial differences, each of which is firmly grounded in the text of H.B. 292, is to repeat the claim that the Ohio court interpreted H.B. 292 as not imposing "additional substantive requirements." But that judicial label is irrelevant: H.B. 292 in purpose and effect operates to impose substantive conditions on the exercise of FELA claims, conditions that are not

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[6] *Johnson v. Fankell*, 520 U.S. 911 (1997), does not affect this analysis. The Court there held that state procedural rules were not preempted because there was no substantial federal interest involved: application of the state "procedural rules," this Court said, "is . . . less an interference with *federal* interests than a judgment about how best to balance . . . competing state interests." *Id.* at 919-20. Here, as explained, substantial federal interests are at stake.

applicable under the case management order. *See* Pet. 12-21.

III. REVIEW BY THIS COURT IS NEEDED

The decision below deepens confusion in federal and state courts over FELA preemption, directly conflicts with a decision of Georgia's highest court, and raises important issues that are likely to recur and further divide state and federal courts. *See* Pet. 26-33. The petition also establishes that the decision below creates an immediate disuniformity in state court applications of the FELA that only this Court can correct. *See id.* Each of those justifications warrants this Court's review.

Respondent's contrary arguments are unpersuasive. *First*, respondent's effort to downplay the conflict between the Ohio court's decision and *Daimler Chrysler Corp. v. Ferrante*, 637 S.E.2d 659 (Ga. 2006), is unconvincing. In direct conflict with the decision below, the Georgia court held that a state statute similar to H.B. 292 impaired substantive rights by adopting a heightened causation standard for asbestos claims. *See id.* at 661-62. Crucially, it was irrelevant to the court's analysis that dismissed claims were "not preserved for the purposes of the applicable statute of limitations," as respondent argues here (at 27) — the Georgia court did not even cite that facet of the statute. The crucial distinction — as now determined by those two state courts interpreting virtually identical statutes — is that, in Ohio, threshold evidentiary rules like those imposed by H.B. 292 are *not* substantive restrictions on FELA plaintiffs' rights, whereas in Georgia they are. This Court should grant review to resolve this divide between state high courts.

Second, respondent seeks to sidestep (at 28) the conflicting decisions reached by state courts on FELA preemption on the ground that there is no conflict on "the same federal question." In the FELA context, however, this Court has been resolute to review decisions of state courts that conflict with federal law, without even hinting at "the same federal question" standard. *See, e.g., Dice v. Akron, C. & Y.R.R.*, 342 U.S. 359, 361 (1952). Even outside of the FELA context, this Court has granted certiorari in cases involving laws that burden federal interests absent express conflicts. *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 498-511 (2000); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339 (1992). The federal interests at issue here compel the same result.

In any event, respondent misapprehends the appropriate level of generality in arguing that there is no conflict on "the same federal question." The petition shows that multiple state high courts, contrary to the Ohio court, have held that FELA standards of proof, burdens of proof, and quanta of proof are governed by federal, not state, law. *See Haselden v. Atlantic Coast Line R.R.*, 53 S.E.2d 60, 63 (S.C. 1949); *Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 28 (S.C. 2008); *Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 170 (Tex. 2002); *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 431 (D.C. 1994); *Adair v. Northern Pac. Ry.*, 392 P.2d 830, 831 (Wash. 1964); Pet. 26-29. To be sure, those courts were not construing H.B. 292, but analyzing conflict claims at that level of generality is absurd: it would effectively immunize from this Court's review decisions upholding the constitutionality of state laws that burden

federal interests, and it ignores the obvious conflict between Ohio and other states on whether federal or state law governs these aspects of FELA claims.

In sum, the decision below substantially conflicts with a decision of the Georgia Supreme Court, is in conflict with multiple other state high courts (as well as decisions of this Court), and deepens confusion in state and federal courts regarding FELA preemption. Beyond those considerations, respondent does not deny that the key issue in this case — whether states may burden the exercise of federal rights in an effort to manage asbestos litigation — is certain to recur in view of accelerating state asbestos reform (modeled on H.B. 292). *See* Pet. 31. This Court should grant certiorari now to provide needed guidance and to make clear that, however states may wish to regulate state-law claims, the Supremacy Clause precludes states from impeding the exercise of federal rights in pursuing those litigation reform efforts.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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